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VIA E-MAIL

April 2, 2010

Jason King, P.E., Acting State Engineer
Nevada Division of Water Resources
901 South Stewart St., Suite 2002
Carson City, NV 89701
Email: jking@water.nv.gov

Re: March 16 Workshop on *Great Basin Water Network v. Taylor*
Comments on proposed statutory language

Dear Mr. King:

I am writing on behalf of the Great Basin Water Network and other petitioners in *Great Basin Water Network v. Taylor* (collectively "GBWN") to provide comments to the proposed statutory revisions submitted in the wake of the March 16, 2010, workshop on the Nevada Supreme Court's Opinion in that case. First, let me state emphatically that GBWN does not believe it is necessary or appropriate to pursue legislative action through a special session of the Nevada Legislature at this time. A special session, or any legislative action, at this time would be inappropriate because the purportedly problematic aspects of the Nevada Supreme Court's opinion in that case: (1) currently are being reconsidered by the Court and therfore may be addressed by the Court in such a way as to eliminate or minimize the need for any intrusion by one branch of government on another's province; (2) as the State Engineer and SNWA know because they initiated the process, the the parties to the case currently are discussing a mutually agreeable proposal to the Court that would eliminate all or virtually all issues giving rise to any of the proposed legislative revisions; and (3) the specific nature and scope of the Court's ruling in this case have not even been finally determined because the District Court has not received the case back on remand and so has not had an opportunity to examine the speciifc facts and equities in *this* case in order to determine what remedy is, in fact, appropriate, as the District Court expressly is required to do by the Supreme Court's ruling.

In addition, GBWN stresses to the State Engineer that there are additional interested persons in rural eastern Nevada who want to have their voices heard on the issue of whether to take legislative action and, if so, what type of legislation to recommend, but who do not have internet access or email. Some of these Nevadans have not had an adequate opportunity to review the various legislative proposals and related materials posted on the State Engineer's web sites and submit written responses to the State Engineer by today. We echo the remarks of Assemblyman David Bobzien at the Legislature's Public Lands Committee meeting on March 18th, and urge

you to hold the process of considering public input open for an additional time in light of the fact that no special session of the Legislature would be called before June at the very earliest, and the fact that the Parties presently are discussing a possible compromise outcome in the Supreme Court which could profoundly change the landscape for any potential legislation.. We do not suggest an open-ended process, but believe that an additional two weeks for public comment is warranted and that the State Engineer should wait until he has considered all public comment before refusing to hold any additional public workshop or hearing.

While GBWN does not believe any legislative intrusion on the Supreme Court's ruling in this case is appropriate at this time, in the spirit of constructive discussion of what potential legislation might be appropriate at some point GBWN offers the following comments and recommendations.

In general, GBWN thinks it would be appropriate to consider legislation that is carefully crafted to ensure that: (1) applicability of the Supreme Court's ruling in *GBWN v. Taylor* to SNWA's 1989 applications is unimpeded; (2) the remedy provided in that ruling to address the constitutional concerns raised by the Petitioners in that case is preserved fully intact; and (3) the ruling remains applicable to protested applications characterized by closely analogous factual and procedural circumstances. Provided it conforms to those parameters, GBWN could support legislation that places other un-protested applications beyond the scope of the ruling and clarifies that in general neither the continuing effectiveness nor the priority of applications or existing water rights is affected by the ruling. This position seems to be consistent with the position advanced by the State Engineer in the petition for rehearing he has filed with the Supreme Court in that case.

More particularly, if legislation is proposed to ensure that the Supreme Court's ruling in *GBWN v. Taylor* is not given too broad a scope, such legislation should conform to the following parameters:

- The ruling's application to SNWA's 1989 applications and to other factually analogous protested applications should be left unaffected;
- The factors to be considered in determining how closely analogous the facts of other applications are to these applications should include: (1) the length of time the application was pending before action by the state engineer; (2) the level of protest and controversy concerning the action proposed by the application; (3) the extent to which original protestants, successors in interest to original protestants, or other parties who have demonstrated an interest in protesting the application would otherwise be excluded from participating in the State Engineer's decisionmaking process; and (4) the magnitude of the amount of water at issue and/or the potential impacts from the proposed action; and
- All other applications, regardless of whether they were filed prior to or after the 2003 amendments to NRS 533.370, that are pending and have been pending for five or more years should be subject to new publication, protest period, and protest hearing procedures that are the same as the procedures for new applications, i.e., those set forth in NRS 533.360 to 533.369, inclusive.

Again, GBWN believes no action should be taken that would interfere with the Supreme Court's current consideration, or the Parties' current discussions over a potential agreed resolution, of these issues, or with the court's final ruling as to the appropriate remedy in this particular case. However, once the judicial process truly has concluded, if there still are legitimate grounds for concern over the ruling's scope of application, GBWN would be willing to cooperate in crafting and would support a legislative measure that conforms to the parameters outlined above.

GBWN's comments on the six legislative proposals posted on the State Engineer's web site are set forth below.

VERSION 1:

The language proposed in Version 1 is too sweeping and simplistic. It would have the effect of negating the Supreme Court's ruling in *Great Basin Water Network v. Taylor* as to SNWA's 1989 applications and would fail to make any provision for the possibility of similarly inequitable and impermissible situations in closely analogous cases. It also fails utterly to address the fundamental inequity inherent in allowing applicants to dictate open-ended delays without requiring new publication and protest periods to ensure a fair opportunity for affected people to protest. Accordingly, this proposal is unacceptable to GBWN. As noted in GBWN's comments submitted in advance of the State Engineer's March 16 Workshop, legislative action cannot negate the constitutional violations that arose in that case. By the same token, an overly simplistic approach to legislation, such as Version 1, would permit and possibly encourage the replication of such constitutionally defective procedures.

VERSION 2:

GBWN might support the changes proposed by Version 2, with several revisions. The addition to section 3 in Version 2 is problematic, because it would create a conflict between sections 3 and section 8(d) with regard to SNWA's 1989 applications. With regard to those applications, the ruling makes clear that the State Engineer's failure to act within a year of the filing date *does* affect the status of the approval granted and that at the very least, supplemental hearings must be held. GBWN suggests that if the State Engineer wishes to adopt a variation of Version 2, there must be language added to section 3 exempting applications that are the subject of a pending appeal or court order as of January 31, 2010.

Subsection 9(d) – 8(d) in the statute as it currently stands – is too narrow..It must be modified to provide for a new publication process and protest period that conforms to the provisions for new applications, as proposed in Version 4.

New subsection 9(e) is unacceptable because it would exempt all of SNWA's 1989 applications that already have been acted on by the State Engineer, except those in Cave, Dry Lake, and Delamar Valleys, and the small number of potentially analogous applications addressed elsewhere in these comments. It also should be made clear that in the case of applications or permits that are the subject of pending appeals, re-publication, a new protest period, and supplemental hearings will be required.

VERSION 3:

The addition to section 4 in Version 3 is problematic, because it would create a conflict between sections 4 and section 8(d) with regard to SNWA's' 1989 applications that have been acted on by the State Engineer. In the circumstances of SNWA's 1989 applications, the Supreme Court's ruling makes clear that the State Engineer's failure to act within a year of the filing date *does* affect the validity of the approval granted. The ruling also makes it clear that in these, and presumably analogous, circumstances, at the very least, re-publication, a new protest period, and supplemental hearings are required. GBWN suggests that if the State Engineer moves forward with some variation of Version 3, language be added exempting applications that are the subject of a pending appeal or court order as of January 31, 2010.

Version 3 also should make clear that in the case of applications or permits that are the subject of pending appeals, re-publication, a new protest period, and supplemental hearings will be required pursuant to a revised version of subsection 8(d) along the lines proposed in Version 4.

VERSION 4:

Version 4 takes into account the concerns expressed in both GBWN's comments and the critiques of the other 5 versions offered in this letter by GBWN. Accordingly, GBWN suggests that if the State Engineer chooses to advocate for specific legislative language changes, Version 4 provides the most reasonable, balanced, and straightforward approach. It preserves the Supreme Court's holding with respect to SNWA 1989 applications and a very limited class of factually analogous applications, while limiting the decision's reach to one that is manageable for the State Engineer's Office.

One change that should be considered in addition to those already contained in Version 4 is the change of seven years to five years in subsection 8(d). Several petitioners in *GBWN v. Taylor* and other members of the public have pointed out that other statutory regimes more typically employ a five-year period as the timeframe that triggers re-consideration of pending proposals.

VERSION 5:

Version 5 is unacceptable to GBWN as the proposed language would have the effect of negating the Supreme Court's statutory holding in *Great Basin Water Network v. Taylor.* As noted in GBWN's comments submitted in advance of the State Engineer's March 16 Workshop, legislative action cannot eliminate the constitutional deficiencies in that case. The Legislature cannot override the ruling by changing statutory language, and should not consider a proposal such as Version 5 that would encourage repetition of the same constitutional violations.

VERSION 6:

Version 6 is unacceptable to GBWN as it does away with the one year action requirement of 533.370(2), replacing the word "shall" with the word "may." This proposed change would set the stage for situations similar to the one addressed by *Great Basin Water Network v. Taylor*, in which applications are permitted to lay dormant for many years to the disadvantage of protestants and other interested members of the public. While GBWN recognizes that it is not

always possible for the State Engineer to act within one year on a given application, it is essential that the rights of the public to participate in the process be preserved and that postponement of consideration of applications be limited to certain narrow circumstances laid out by statute.

While GBWN supports the general concept outlined in section 2(d), it is necessary to provide protestants with sufficient time to prepare protest cases. Experience has demonstrated that 90 days frequently will be insufficient where applications are complex or controversial and there has been significant delay between filing and hearing. GBWN would suggest at least 12 months time between the end of the new protest period of covered applications and any hearings held on such applications.

Under Version 6, subsection 8(d) also would need to be amended along the lines proposed in Version 4. Section 8(d)'s protest provisions should not be limited to successors in interest.

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Again, as noted in the letter submitted by GBWN in advance of the March 16 workshop, and in our comments at that workshop, GBWN does not believe that legislative action with regard to the Supreme Court's ruling in *GBWN v. Taylor* is necessary or appropriate at this time. Legislative action should not be pursued until the Supreme Court's re-consideration of these issues and the Parties' current negotiations are concluded. At that time, GBWN would be willing to support legislation such as that proposed by Version 4, which was drafted to: (1) eliminate any undue burden on the State Engineer and any undue threat to the validity or priority of virtually all applications and existing rights; and (2) preserve the ruling's applicability to SNWA's 1989 applications and ensure that the constitutional violations involved in that case are adequately addressed.

Sincerely,

Simeon Herskovits
Attorney for Great Basin Water Network, et al.